

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **LPA No.431/2013**

% **Date of decision: 3rd July, 2013**

MOHD ZULFIKAR ALI Appellant

Through Mr.B.K. Pal, Advocate

versus

M/S (WAKF) HAMDARD LABORATORIES
THR ITS HEAD HR, P & A HAMDARD BUILDING Respondent

Through Nemo

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

GITA MITTAL, J (ORAL)

LPA No.431/2013

1. By a separate order passed today, we have dismissed the appeal and directed that we would separately record reasons for doing so. We, hereby, record reasons for which we have not found merit in the appeal.

2. The petitioner assails the order dated 21st March, 2013 passed in WP (C) No.1880/2013 whereby the writ petition was dismissed by the learned Single Judge. The petitioner had assailed an Industrial Award dated 28th March, 2012 by way of the said writ petition.

3. The challenge by the petitioner rests on his contention that he was appointed

as Kushtasaz (medicine maker) on the 5th March, 1996 by the respondent without any appointment letter having been issued to him. The petitioner has complained that no pay slips were issued to him despite repeated oral demands. It is urged that on 19th May, 1997, the little finger of his left hand was cut while the petitioner was cutting white sandal wood for medicinal purposes resulting in 40% disability to the petitioner. As the respondents denied compensation to the petitioner, he filed an application under the Workmen's Compensation Act, 1923 which was rejected on the 9th August, 2000 by an order of the Commissioner. The petitioner's challenge by way of FAO No.36/2011 is pending before this court.

4. It is the petitioner's submission that by an oral intimation dated 1st January, 2001, the petitioner's services were illegally terminated without giving any notices or wages in lieu thereof. The petitioner issued a demand notice dated 3rd March, 2001 and raised an industrial dispute before the Assistant Labour Commissioner of Government of NCT of Delhi. Conciliation was unsuccessful and the appropriate Authority passed an order of reference dated 21st October, 2005 referring the following dispute for adjudication to the Industrial Tribunal:-

“Whether the services of Shri Zulfikar Ali S/o Sh. Mohammad Yakub Ali have been terminated illegally and/or unjustifiably by the management, and if so, to what sum of money as monetary relief along with consequential benefits in terms of existing laws/Govt. Notifications and to what other relief is he entitled and what directions are necessary in this respect?”

5. This reference was registered as ID No.1118/06/05. The respondent

contested the petitioner's claims contending that the petitioner had been engaged only by a daily wage rate basis as a helper to the Kushtasaz at their Lal Quan establishment intermittently as and when the need arose and that he had not put in 240 days of continuous work in any calendar year and that there was no relationship of employer and employee between the parties. It was specifically contended that the petitioner had not put in 240 days of continuous work in the year immediately preceding the alleged date of termination. The respondents also took the stand that the establishment of the management located at Lal Quan was shut down in December, 2000 and all the existing employees of the management stood transferred to its factory in Ghaziabad. All claims of the appellant stood denied.

6. The petitioner had examined himself as a sole witness. The Industrial Tribunal carefully considered the rival contentions. It was carefully concluded by the learned Tribunal that Section 25-B of the Industrial Disputes Act did not make a distinction between a permanent employee or an employee intermittently engaged on daily wage rate basis as and when the need arose. It was consequently held that there was a relationship of the employer and employee between the parties. However, on the question as to whether the workman had worked continuously for 240 days in the management and if so, its effect, the learned Tribunal has held against the petitioner. We find that the Industrial Tribunal

carefully considered the matter and thereupon made an Award dated 28th March, 2012 rejecting the claim of the petitioner.

7. Aggrieved by above Award, the petitioner filed WP (C) No.1880/2013 which was rejected in limine by the order dated 21st March, 2012. The order of the learned Single Judge rests primarily on the consideration of the onus to prove the issue that the petitioner had served the respondents for 240 days in the year preceding his termination. The learned Single Judge has agreed with the above findings returned by the Tribunal and rejected the writ petition. Hence the present appeal.

8. It needs no elaboration that the issue as to whether the petitioner had served for 240 days in the year prior to his termination is an issue of fact. There must be specific pleading to this effect. It is trite that the petitioner having claimed so, onus to prove the same rested on the petitioner. The Industrial Tribunal has noted that the petitioner had failed to even make a pleading in this regard in his claim petition or the rejoinder. The petitioner had placed reliance on 24 gate passes to support this plea. These gate passes, however, were for a period spread over a period of four years which manifests that the petitioner was entering the premises of the respondents only against daily gate passes. If he had been a regular employee for four years, certainly he would have something other than a daily gate pass. Even if the petitioner could be believed, he would have more than 24 gate passes.

9. So far as the claim of the petitioner that he was a regular employee and had served for the 240 days in the year preceding his termination, the Industrial Tribunal has concluded that the petitioner had failed to either plead this fact or to lead any evidence on this issue.

10. Mr.B.K. Pal, learned counsel appearing before us has urged at length that the petitioner having said that he was an employee for 240 days was sufficient and that by making such statement, the petitioner had adequately discharged the onus and burden of proof on him. In support of this submission, reliance has been placed on the pronouncement of the Supreme Court in a case reported at **(2010) 1 SCC 47 Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda** and a judgment of the Bombay High Court reported at **2008 III LLJ 737 (Bom) Sub Divisional Engineer, Irrigation Project, Yavatmal Vs. Sarang Marotrao Gurnule**.

11. Our attention has also been drawn by learned counsel for the petitioner to the cross-examination of the petitioner which has been placed on record. Unfortunately, the affidavit by way of examination-in-chief has not been placed on record. However, even the cross-examination of the petitioner would show that the petitioner makes no disclosure of the dates on which he was employed. There is also no reference to the wages at which he was engaged. The cross-examination does not dislodge the findings returned by the tribunal.

12. So far as the reliance on the pronouncement of the Supreme Court in **(2010) 1 SCC 47 Director, Fisheries Terminal Department Vs. Bhikubhai Meghajibhai Chavda** is concerned, it was held that the appellant had taken the plea that the work was not of seasonal nature and that it was in evidence that the workman had completed 240 days of service in the preceding year. Contradictory documentary evidence was produced by the appellant. Incomplete muster roll was produced in respect of the direction issued by the labour court. In these circumstance, the Industrial Award in favour of the workman was upheld by the High Court which order was challenged before the Supreme Court.

In para 14, the court has noted that the evidence produced by the appellant (employer) had not been consistent. This coupled with the fact that the respondent, as a daily wager, would have difficulty in having access to the official documents, muster roll etc. in connection with his service weighed with the court, and it was for these reasons held that upon his coming forward and deposing, the burden of proof shifted the appellant (employer) to proof that he did not complete 240 days of service in the requisite period to constitute continuous service.

13. We may note the observations of the Supreme Court in **(2006) 1 SCC 106 R.M. Yellatti Vs. Assistant Executive Engineer**. In this case the workman had also produced a certificate issued by the Executive Engineer to the effect that he had worked from 22nd November, 1988 to 20th June, 1994. The Supreme Court

noted that though the workman had been cross-examined on behalf of the Management, there was no material to disbelieve the certificate and, therefore, the Labour Court had arrived at the conclusion in favour of the workman. The Award was sustained by the Supreme Court of India. It was in these circumstances that the Supreme Court observed as follows:-

“.....However, applying general principles and on reading the (aforesaid) judgments, we find that this Court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workman stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on facts of each case.”

17. Applying the principles laid down in the above case by this Court, the evidence produced by the appellant has not been consistent. The appellant claims that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this Court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls, etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the appellant employer to prove that he did not complete 240 days of service in the requisite period to constitute continuous service.”

14. In So far as the pronouncement in **2008 III LLJ 737 (Bom) Sub-Divisional Engineer, Irrigation Project Yavatmal Vs. Sarang Marotrao Gurnule** is concerned, the appellant claimed to have been working as a daily wager w.e.f. 1st May, 1985 till 2nd February, 1991. The workman had claimed that he had worked for more than 240 days in a year and that the respondents were giving technical breaks in his service so as to debar him from the benefit of regularisation. The services of the workman were terminated by an order dated 3rd February, 1991 in respect of which he raised an industrial tribunal which was referred to the Labour Court and an award came to be passed in favour of the workman. The Labour Court had made an award concluding that the workman had worked for more than 240 days of the year as required under Section 25-B of the Industrial Disputes Act, 1947 and his termination was in violation of Section 25-F of the Industrial Disputes Act and, therefore, illegal. The order of the Labour Tribunal was upheld by the Division Bench of the Bombay Court.

15. It is trite that judgments of courts are to be construed with reference to the facts which they decide. [Ref.: **(2008) 1 SCC 494 Sarva Shramik Sanghatana (KV) v. State of Maharashtra (Paras 14 to 17)**]. This judgment of the Bombay High Court has been rendered in the facts and circumstances of the case and would not impact the adjudication in the present case.

16. The statement by the present petitioner that he was an employee for 240

days in a year has to be tested against the requirement of law. In the impugned Award dated 28th March, 2013, the Industrial Tribunal has made a detailed consideration and referred to binding judicial precedents of the Supreme Court of India. On the issue of burden of proof, we find that reference has been made to a judgment reported at **2006 (6) A.D. Delhi 180 M/s Automobile Association of Upper India Vs. PO Labour Court-II & Anr.**

17. The impugned Award has heavily relied on the pronouncement of the Supreme Court reported at **(2005) 5 SCC 100 Manager, Reserve Bank of India, Bangalore Vs. S. Mani & Ors.** wherein it had been held that it is only if the initial burden of proof, which was on the workman, was discharged to some extent that a finding can be returned in respect of the defence of the management. Furthermore, the plea having been set up by the workman, the initial burden of proof was on the workman to show that he had been employed by the petitioner in the claimed capacity on the stated terms. The circumstances in which the court may draw an adverse inference against the management were also succinctly set down.

18. We may also notice the following principles laid down by the Supreme Court in **(2002) 3 SCC 25 Range Forest Officer Vs. S.T. Hadimani:-**

“3..... in our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but his claim was denied by the appellant. It was then for the claimant to

lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filling of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On the ground alone, the award is liable to be set aside.”

Therefore, the petitioner’s contention that his statement in the affidavit to the effect that he had worked continuously for 240 days was by itself sufficient proof, is not correct.

19. The consideration of the evidence led by the petitioner by the Tribunal in paras 13 to 17 is material and deserves to be considered in extenso. The same reads as follows:-

“13. In his affidavit filed as examination-in-chief, the claimant specifically stated that he worked for more than 240 days with the management. Significantly, in the claim, rejoinder and even in the affidavit filed as examination-in-chief, it is nowhere the case of claimant that he worked at least 240 days with the management during the year immediately preceding the date of his termination.

14. In his affidavit, the claimant relied upon photocopies of certain gate passes as Mark A. In his cross-examination, it was suggested by the management that Mark A were issued to him as and when he reported to the management only. This suggestion was denied by the claimant. Another suggestion was given to him in his cross-examination by the management that the gate passes were issued only for the specific duration of time. This suggestion was also denied by the claimant. These suggestions clearly show that the management admits the issuance of gate

passes Mark A. A perusal of the gate passes Mark A shows that the gate passes bear different dates, meaning thereby the gate passes were issued for that date only and not for the month or week or even for more than one day at a time. The space after “care no.” is either blank or crossed. I am of the view that it shows that the claimant was not a permanent employee of the management. Further, the total gate passes Mark A filed by the claimant are only 24. They bear different dates starting from the year 1996 to year 2000. In other words, for the period of almost 4½ months, only 24 gate passes have been placed on record by the claimant. Except for these gate passes, no other document has been placed on record by the claimant to show that he worked for 240 days with the management during the year immediately preceding the date of this alleged termination.

15. As noted above, in the rejoinder, it is claimed by the claimant that deductions towards provident Fund were made from his salary. Significantly, in the claim itself, it is the case of the claimant that he was not given any pay slip. Hence, the basis of this claim (i.e., deduction towards provident fund was made from his salary) has not been disclosed. No application was filed by the claimant seeking a direction to the management to produce any record in this regard. Hence, no adverse inference can be drawn against the management.

16. No co-employee was examined by the claimant to show/prove that he worked for 240 days with the management during the period of one year immediately preceding the date of his termination.

17. In view of the above discussion, there cannot be any doubt that the claimant has failed to prove that he worked for at least 240 days with the management during the year immediately preceding the date of his alleged termination. The issue is, accordingly, decided in favour of the management and against the claimant.”

20. The findings of facts returned by the Industrial Tribunal have been upheld

by the learned Single Judge. The same are, therefore, also unassailable. In any case, the petitioner has failed to make out any legally tenable ground to sustain a challenge to the findings returned by the Industrial Tribunal or the order of the learned Single Judge.

We find no merit in this appeal which is hereby dismissed.

(GITA MITTAL)
JUDGE

(DEEPA SHARMA)
JUDGE

JULY 03, 2013
aa